BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHRISTOPHER NEWMAN	)	
Claimant	)	
	)	
vs.	)	
	)	CS-00-0440-897
GROENDYKE TRANSPORT INC.	)	AP-00-0448-466
Respondent	)	
	)	
and	)	
	)	
GREAT WEST CASUALTY COMPANY	)	
Insurance Carrier.	)	

ORDER

Respondent and Insurance Carrier request review of the December 17, 2019, preliminary Order entered by Administrative Law Judge (ALJ) Ali Marchant.

APPEARANCES

Jonathan E. Voegeli, of Wichita, Kansas, appeared for Claimant. Darin M. Conklin, of Topeka, Kansas, appeared for Respondent and Insurance Carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing held November 7, 2019, with Claimant's Exhibits A.1 through A.9 and Respondent's Exhibits B.1 through B.14, and the pleadings and orders contained in the administrative file.

ISSUE

Whether Claimant is barred from receiving workers compensation benefits, under K.S.A. 2018 Supp. 44-501(a)(1)(D), on account of a reckless violation of Respondent's safety policies.

FINDINGS OF FACT

Claimant worked for Respondent as a fuel truck driver during the evening shift. Claimant's work required him to drive a fuel truck he shared with another driver who worked the day shift, Mr. Kochert. Claimant began his shift at Respondent's yard, where Claimant received his delivery assignments from Respondent's dispatchers. Claimant

drove his truck to the Phillips 66 (Phillips) terminal, which was located approximately one mile from Respondent's yard, where Claimant filled his truck with gasoline. After clearing the security at the Phillips terminal, Claimant drove to the "rack," where Claimant filled the truck's tank with gasoline. Claimant used a computer-assisted fueling system after connecting the fueling system to the truck's tank with a valve. After filling the truck with gasoline, Claimant would drive his truck to Phillips' "Bill of Lading Shed," where Claimant would receive a bill of lading from a Phillips employee called a "Guager." After receiving the bill of lading, Claimant would leave the Phillips terminal and make fuel deliveries to Respondent's customers. Claimant used an iPad to log his trips and mileage while working.

Both Respondent and Phillips have safety rules Claimant was required to follow. In particular, Respondent has safety rules prohibiting drivers from smoking in non-designated areas, smoking while handling or transporting hazardous materials and smoking inside the cab of a loaded fuel truck or within twenty-five feet of a loaded fuel truck. Claimant was aware of these rules. Claimant testified, "You do not smoke in a truck, you do not smoke in the rack, you do not smoke near the truck or anything. You are hauling gas."[1] Mr. Kochert testified Claimant told him he tried not to smoke in the truck, but if he did he lowered a window. Mr. Kochert, a non-smoker, testified the truck cab smelled like smoke. Mr. Kochert occasionally saw an empty pack of cigarettes in the truck cab, but no ash, cigarettes or butts. Mr. Kochert did not know whether the empty cigarette packages belonged to Claimant.

On occasion, a driver would spill fuel while loading a truck at the Phillips rack, and the driver was required to immediately call the guager to report the spill. Respondent also required drivers to report fuel spills to them, but the drivers were not expected to report the spill immediately. Claimant understood he was required to report spills at the Phillips rack to the guager, but not to Respondent. Claimant understood he was required to report any spills occurring outside of the Phillips rack to Respondent.

On January 13, 2019, Claimant was at the Phillips rack at the beginning of his shift and spilled gasoline while loading his truck's tank. Most of the gasoline spilled on the ground, but Claimant was also soaked with gasoline from the waist down both legs. Claimant reported the spill to the guager by phone, and endeavored to clean some of the spill as a courtesy to the next driver in line, Mr. Rider. Another driver, Mr. Burke, was filling his truck in the adjacent rack. After making the call and cleaning off some of the spill, Claimant moved his truck to the Bill of Lading Shed and obtained a bill of lading from the guager. Claimant then spoke briefly with Mr. Rider about the spill after Mr. Rider pulled his truck to the rack. Mr. Rider testified Claimant knew he was covered in gas and planned to go back to Respondent's yard to change his clothes. Claimant got into his truck.

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[1] P.H. Trans at 25.

Claimant testified that while inside the cab he was using the iPad as it was resting on his right knee. Claimant felt a biting or burning sensation on his leg and Claimant unbuckled his pants. A ball of flame rose up and Claimant was on fire. Claimant exited the cab and tried to put out the fire. Mr. Rider and Mr. Burke noticed Claimant was on fire, and ran to Claimant and put out the fire, which ran from Claimant's feet to his waist. Neither Mr. Rider, nor Mr. Burke, were watching Claimant when he was inside the cab, and neither gentleman knew the reason for the fire. Claimant, a smoker, denied smoking or lighting a cigarette inside the cab. Mr. Rider and Mr. Burke denied seeing Claimant smoking and denied seeing physical evidence of Claimant smoking before the fire. Phillips' security video of the scene did not depict Claimant inside the truck. Claimant told Mr. Rider and Mr. Burke that they did not see anything, and Claimant was worried about his job after the fire. Claimant did not report the incident to Phillips. Claimant drove back to Respondent's yard to change his clothes and to continue working.

Upon returning to Respondent's yard, Claimant left his truck and went to the building housing the dispatchers and the showers in the drivers lounge. Mr. Held and Mr. Baldwin were the dispatchers working on January 13, 2019. Claimant entered the building and told Mr. Held and Mr. Baldwin he "pooped his pants", and needed to shower and change his clothes. Mr. Held testified Claimant had an agitated look on his face at the time. Mr. Baldwin thought Claimant smelled of gasoline. Claimant took off his clothes in the lounge and noticed his underwear melted to the skin on his legs. Claimant's burnt skin peeled off his legs. Claimant showered and changed his clothes.

After showering and changing his clothes, Claimant returned to Mr. Held and Mr. Baldwin in the dispatch area. Mr. Held thought Claimant appeared to be in shock, but Mr. Baldwin did not think Claimant was agitated. Claimant told Mr. Held and Mr. Baldwin, "I'm not going to lie to you. I sprayed gas on myself and lit myself on fire. And I need to go to the emergency room."[2] Claimant denied saying he caught himself on fire due to smoking a cigarette. Both Mr. Held and Mr. Baldwin completed written statements stating Claimant said he lit himself on fire from lighting a cigarette. Mr. Held subsequently testified Claimant stated he "must have tried lighting a cigarette", which caused the fire, but Mr. Held thought Claimant was still in shock when he made the statement.[3] Mr. Baldwin did not believe Claimant said he "must have" lit a cigarette. Claimant told Mr. Baldwin and Mr. Held to call Mr. Hotmar, the Terminal Manager for Respondent, because Claimant needed medical treatment. Claimant left the building and got into his car to retrieve his wallet from the Phillips rack.

Claimant admitted he smoked a cigarette in his car while driving to the Phillips rack. At the Phillips rack, the guager asked Claimant to speak with the guager's supervisor about

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[2] Held Depo. at 7.

[3] *Id*., at 10-11.

the accident. Claimant was told by the supervisor a report of the accident would be prepared. Clamant drove himself to Wesley Medical Center.

At Wesley Medical Center, Claimant told the emergency room staff he spilled gas on himself and caught fire. There is no record Claimant reported the fire was caused by lighting a cigarette. Claimant was treated for burns to both legs and left hand at Wesley Medical Center, and Claimant was given intravenous pain medication. Claimant was transferred to Via Christi Medical Center Burn Department. Claimant received further treatment for his burns, and for a MRSA infection that developed at the burn sites. While Claimant was hospitalized and receiving pain medication, Mr. Hotmar visited Claimant. Mr. Hotmar requested a report of the accident, and Claimant dictated a report that Mr. Hotmar transcribed. Claimant denied telling Mr. Hotmar the fire was caused by lighting a cigarette, and Claimant's statement has no description of the fire being caused by smoking.

Mr. Hotmar confirmed he was at home when the accident occurred, and he initially learned about the accident when Mr. Baldwin called him. Mr. Hotmar obtained written statements from Mr. Baldwin, Mr. Held and Claimant. Mr. Hotmar initially saw Claimant at Wesley Medical Center before he was transferred to Via Christi. Claimant asked Mr. Hotmar whether he was going to lose his job, but Claimant did not tell Mr. Hotmar the fire was caused by smoking or by lighting a cigarette. Mr. Hotmar obtained Claimant's statement at Via Christi. When Mr. Hotmar told Claimant about Mr. Baldwin statement, Claimant denied smoking and became agitated. Mr. Hotmar also saw the video of the Phillips rack when he visited with Phillips personnel about the accident. Mr. Hotmar confirmed the video did not show Claimant smoking or lighting a cigarette. Mr. Hotmar searched the truck Claimant was driving, and found some ashes in a cupholder and an empty cigarette pack on top of a cooler bag in the cab, but no actual cigarettes or cigarette butts. Mr. Hotmar did not obtain statements from Mr. Rider or Mr. Burke.

Mr. Hotmar confirmed while Claimant was hospitalized, Respondent's Safety Committee decided to terminate Claimant for violating the company policy requiring all fuel spills to be reported by the driver to Respondent. In particular, Claimant was terminated for failing to report the fuel spill at the Phillips rack to Respondent, although Mr. Hotmar indicated Claimant would not have been expected to immediately report the spill. Mr. Hotmar understood Claimant was banned by Phillips from accessing the rack because Claimant did not report the fuel spill. After being released from the hospital, Claimant contacted Mr. Hotmar about returning to work. Mr. Hotmar told Claimant he was terminated by Respondent. Claimant is currently working full-time for another trucking company.

Via Christi recommended Claimant be evaluated by a mental health care professional for possible psychological treatment. Claimant was evaluated by Dr. Moeller, who recommended treatment for possible post-traumatic stress disorder caused by Claimant's injuries. Following a preliminary hearing, ALJ Marchant issued a preliminary Order dated December 17, 2019, granting the request for psychological treatment. ALJ

Marchant concluded Respondent did not prove Claimant was smoking or lighting a cigarette when the accident occurred. Therefore, Claimant was not barred from receiving workers compensation for reckless violation of Respondent's safety rule or policy. Respondent was ordered to provide a list of two psychologists, from which Claimant would choose one to serve as the authorized treating health care provider.

PRINCIPLES OF LAW AND ANALYSIS

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.[4] The provisions of the Workers Compensation Act shall be applied impartially to all parties.[5] The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.[6] The employer has the burden of proving whether a reckless violation of a safety rule or violation has occurred.[7]

Compensation for an injury shall be disallowed if such injury results from the employee's reckless violation of their employer's workplace safety rules or regulations.[8] The Workers Compensation Act does not define "reckless." The Appeals Board, looking to prior case law, defines "reckless" as either (1) where an actor knows or has reason to know of facts creating a high degree or risk of physical harm and deliberately acts or fails to act in conscious disregard or indifference to that risk, or (2) where an actor knows or has reason to know, but does not appreciate the high degree of risk, although a reasonable person in the actor's position would do so. The conduct must be unreasonable and involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.[9] A violation of instruction alone is not enough, and the statute does not apply to mere negligence or poor judgment.[10] The preponderance of the credible evidence must

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[4] K.S.A. 2018 Supp. 44-501b(a).

[5] *Id*.

[6] K.S.A. 2018 Supp. 44-501b(c).

[7] *See Castillo-Chavez v. Ammex Masonry, Inc., et al.*, No. 1,062,121, 2013 WL 2455712, at *6 (Kan. WCAB May 9, 2013).

[8] K.S.A. 2018 Supp. 44-501(a)(1)(D).

[9] *See Van Le v. Exacta Aerospace, Inc.*, No. 1,060,178, 2012 WL 6101126, at *4 (Kan. WCAB Nov. 27, 2012).

[10] *Id*.

support a conscious disregard of a known risk that exceeds negligence; Recklessness is akin to gross, culpable or wanton negligence.[11]

In this case, there is no dispute Claimant caught fire while performing his work duties for Respondent. The fire was the prevailing factor causing Claimant's injuries. It is undisputed Claimant's post-traumatic stress disorder symptoms and need for psychological treatment are related to the physical injuries caused by the fire. The issue is whether Claimant is barred from receiving compensation because he recklessly violated Respondent's safety rules and policies. Claimant contends no violation occurred because he was not smoking or lighting a cigarette when the fire occurred. Respondent contends Claimant was smoking or lighting a cigarette when the fire occurred, which would be an obvious violation of the safety policies prohibiting smoking inside or around trucks containing fuel. An administrative law judge is in the enviable position of having the opportunity to observe witnesses testify in person, and the Appeals Board has given an administrative law judge's credibility determination some deference because of this.[12]

Based on review of the record as a whole, and giving due deference to the ALJ's credibility determinations, the undersigned concludes Respondent did not meet its burden of proving the fire occurred because Claimant was lighting a cigarette or smoking. The video taken of the accident scene does not show what Claimant was doing. Claimant consistently testified he was not smoking or lighting a cigarette inside the truck. The medical records do not state Claimant was smoking or lighting a cigarette when the fire occurred. Claimant did not admit in his written statement, which was made while Claimant was taking pain medication in the hospital, he was smoking or lighting a cigarette when the fire occurred. Both Mr. Rider and Mr. Burke, who were in Claimant's vicinity at the time of the fire, testified they did not see Claimant smoking at the time of the fire. Claimant did not tell Mr. Rider or Mr. Burke he was smoking or lighting a cigarette when the fire occurred.

Mr. Baldwin and Mr. Held, both relying on Claimant's statements, wrote in their statements Claimant admitted he lit himself on fire while lighting a cigarette. Mr. Held subsequently modified his position by testifying Claimant said he "must have" lit a cigarette when determining the cause of the fire while in a state of shock. Mr. Baldwin stood by his written statement. The statements and testimony of Mr. Baldwin and Mr. Held are contradictory. Moreover, the safety rule violation leading to Claimant's termination was not smoking in or around a truck filled with fuel, but rather the failure to immediately report a fuel spill.

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[11] *Hardiman v. Kellogg Snack Division*, No. 1,062,612, 2013 WL 3368494, at *2 (Kan. WCAB Jun. 10, 2013).

[12] *See, e.g., Burns v. CHS, Inc.*, No. 1,084,167, 2018 WL 5794061, at *7 (Kan. WCAB Oct. 22, 2018).

The evidence supporting Respondent's position is contradictory, while the evidence supporting Claimant's position is consistent. The undersigned finds the greater weight of the credible evidence proves Claimant was not smoking or lighting a cigarette when the accident occurred. Accordingly, Respondent did not meet its burden of proving the alleged safety rule or policy violation occurred, and Claimant is not barred from receiving compensation under K.S.A. 2018 Supp. 44-501(a)(1)(D).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2018 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned the preliminary Order of Administrative Law Judge Ali Marchant dated December 17, 2019, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2020.

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WILLIAM G. BELDEN
APPEALS BOARD MEMBER

cc: Via OSCAR
Jonathan Voegeli, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
Hon. Ali Marchant, Administrative Law Judge

[13] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2018 Supp. 44-555c(j).